No. 83-196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

MONSANTO COMPANY,
Appellee.

On Appeal from the United States District Court for the Eastern District of Missouri

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), NATURAL RESOURCES DEFENSE COUNCIL, INC., ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, FRIENDS OF THE EARTH, CALIFORNIA AGRARIAN ACTION PROJECT, NATIONAL COALITION AGAINST MISUSE OF PESTICIDES, AND NATIONAL AUDUBON SOCIETY AS AMICI CURIAE IN SUPPORT OF APPELLANT

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This brief *amici curiae* is filed with the consent of the parties as provided for in Rule 36.2 of this Court's Rules.

INTRODUCTION AND STATEMENT OF THE INTEREST OF THE AMICI CURIAE

Modern pesticide chemistry involves the synthesis of entirely new molecules of matter and their introduction

into the natural environment for the purpose of destroying harmful or unwanted plants, animals, fungi, or bacteria. See J.S. App., at 5a-7a. Because these chemicals are new, their effect upon beneficial plants, animals and the environment, as well as upon human beings, is initially unkown. Short-term, acutely toxic effects (ranging from skin irritations, dizziness, and nausea, to more severe poisoning, to death) are likely to be recognized relatively soon after synthesis; as a result, these hazards are often controlled through the handling or use directions for a new pesticide. But there is also the possibility of less obvious deleterious effects: "[T]hese toxic chemicals, used daily in our homes and on our farms, are suspected of having the potential for causing such tragic effects as cancer, birth defects, genetic mutations, and interference with biological reproduction." 123 Cong. Rec. 25712 (July 29, 1977) (remarks of Sen. Kennedy). Such effects have in some instances been discovered only after years of use of a particular chemical.[1] The purpose of requiring health and safety testing of pesticides as a prerequisite to registration and sale is to avoid as far as

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[1] For example, in 1977 California removed the pesticide DBCP, which had been in use since the 1950's, from further use when a number of workers in a pesticide manufacturing plant were found to have become sterile. 3 Cal. Admin. Code § 6370. In 1979, the United States Environmental Protection Agency followed California's earlier decision and cancelled the registration of DBCP (44 Fed. Reg. 65135 (Nov. 1, 1979)), which, it now appears, is carcinogenic as well. *See* California Department of Health Services, *Literature Review of Toxicological Aspects of DBCP and An Epidemilogical Comparison of Pattern of DBCP Drinking Water Contamination with Mortality Rates from Selected Cancers in Fresno County, California, 1970-79* (June 1, 1982) ("DBCP contamination of drinking water is associated with an increased number of deaths from 1970-79 from certain cancers associated with DBCP.") Only *after* DBCP was banned was the chemical discovered in over 2,000 drinking water wells in California, and in groundwater in Hawaii and Arizona as well. Ramlit Associates, Inc., *Groundwater Contamination by Pesticides: A California Assessment*, at 28 (submitted to California State Water Resources Control Board, June, 1983).

possible these after-the-fact discoveries that the pesticide injures people and the environment.

The *amici curiae* are a coalition of labor and environmental groups concerned with protecting their members from all avoidable health hazards resulting from the production and use of modern pesticides. The *amici curiae's* interest in this case stems from their efforts to obtain, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., and § 10(d) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended in 1978, 7 U.S.C. § 136, the health and safety data the Environmental Protection Agency relied on in registering sixteen widely-used pesticides, including one (glyphosate or "Roundup") proposed for registration by appellee Monsanto Company.[2]

The reason the *amici curiae* are seeking this data has *nothing* to do with any commercial interest in pesticides, and the data these organizations are seeking does *not* concern chemical formulas, inert ingredients, or manufacturing processes. Indeed, there would be no reason for *anyone*—even a commercial competitor—to request information from EPA in order to discover the makeup of the active ingredient in a pesticide. The molecular formula of the active ingredient necessarily becomes known though the most basic principles of chemical nomenclature when a pesticide is marketed.[3] While information revealing

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[2] While the National Audubon Society did not join in that particular information request and has not therefore participated in the resulting litigation described at pp. 5-6, *infra*, the Audubon Society has made numerous similar requests and it is by reason of those requests that the Audubon Society joins in the filing of this brief *amici curiae*.

[3] Under the system of chemical nomenclature, the scientific name of a substance specifies its formula. The system is "simple enough to allow any chemist familiar with the rules . . . to derive the structure of a given compound from its [chemical] name." T. Solomons, *Organic Chemistry* (1976), at 90-91. EPA regulations require that the scientific name of a pesticide's active ingredient appear on its label. 40 C.F.R. § 162.10(g) (1983). Consequently, the chemical makeup of the active ingredient in every pesticide marketed is com-

manufacturing processes for, or the identity or percentage of inert ingredients in, a pesticide is ordinarily not disclosed under FIFRA (7 U.S.C. § 136h(d)), an individual interested in obtaining this information would have little difficulty doing so, and therefore would have little incentive (even if it were possible to do so) to attempt to reason back from the data which *is* disclosable under FIFRA to discover these aspects of a pesticide's composition.[4]

The *amici curiae* do, however, have a critical reason for collecting pesticide health and safety data: to submit the data to independent scientists to obtain those scientists' judgment whether or not the tests performed indeed prove what the tests are alleged to have demonstrated—*viz.*, that the pesticide in question, used in the

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monly known within the field, and appears in generally available reference books. *See, e.g.*, Farm Chemicals Magazine, *1982 Farm Chemicals Handbook*, at C254. (A copy of the 1982 Farm Chemicals Handbook entry for Roundup appears as "Appendix A" to this brief.)

[4] First, any chemist with knowledge of the major types of organic chemical reactions could develop a synthesis procedure for any specific pesticide compound. College organic chemistry students routinely develop such syntheses; one text, in fact, introduces students to the topic of chemical synthesis by presenting a method for deriving the synthesis procedure for 1,2 Dichloropropane, a major ingredient in the Shell pesticide D-D. *See* T. Solomon, *Organic Chemistry, supra*, pp. 53-55. Moreover, reference books are available which detail the manufacturing process for hundreds of pesticides. M. Sitting, Ed., *Pesticide Manufacturing & Toxic Materials Control Encyclopedia* (1980); M. Satriana, Ed., *Insecticide Manufacturing—Recent Processes and Application* (1983).

Second, as to the identity and proportional quantity of inert ingredients, these are "generally easily ascertainable through chemical analysis." McGarrity & Shapiro, *The Trade Secrets Status of Health & Safety Testing Information: Reforming Agency Disclosure Policies*, 93 Harv. L. Rev. 837, 876 (1980). The techniques available include chromotography and spectroscopy. *See* Maugh, "A Survey of Separative Techniques," 222 *Science* 259 (1983); Cooks, Busch & Glish, "Mass Spectrometry: Analytical Capabilities and Potentials," 222 *Science* 273 (1983); Wilkens, "Hyphenated Techniques for Analysis of Complex Organic Mixtures," 222 *Science* 291 (1983).

approved matter, "will not generally cause adverse effects on the environment," including adverse human health effects. FIFRA § 10(c)(5), 7 U.S.C. § 136a(c)(5).

The *amici curiae's* first FOIA request, in February, 1982, sought health and safety data, including "all documents relating to carcinogenicity, mutagenicity, neurotoxicity, and teratogenicity and other reproductive effects" of eleven named pesticides. The request was filed for the express purpose of "better protect[ing] the public and our members by ensuring that the health and safety tests . . . conducted by the chemical industry were adequate for that purpose." *See* Letter to Ann Gorsuch, February 2, 1982 (attached hereto as "Appendix B"). When the information was not produced as required by statute, the *amici curiae* joined as co-plaintiffs in *AFL-CIO et al. v. Gorsuch*, U.S.D.C. D.C. No. 82-1195. As a result of a settlement of that suit, the *amici curiae* have obtained most of the data sought on ten of those chemicals and are currently in the process of assembling a panel of scientists to review that data and to prepare a report on the suitability of the test protocols used, and the adequacy and integrity of the data gathered, in order to assess the possible health risks.[5] However, while many scientists have evidenced an interest in serving on such panels, the *amici curiae's* ability to proceed with the plans for scientific peer review of the *AFL-CIO v.*

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[5] The data that was requested and obtained consists largely of reports of the results of controlled experiments assessing the specific effects of exposure to a given pesticide on various animals. Excerpts from one typical study appear as "Appendix C" to this brief to aid the Court in understanding the nature of the materials at issue. *See*, for a detailed exposition of the types of studies that must be submitted to register various types of pesticides, 47 Fed. Reg. 53192 et seq. (Nov. 24, 1982) (proposed 40 C.F.R. Part 158); 40 C.F.R. Part 162 subpart A; EPA, Guidelines for Registering Pesticides in the United States (1981).

As part of the settlement of *AFL-CIO v. Gorsuch, supra*, the *amici curiae* agreed to certain limitations on disclosure of the data obtained. The excerpts contained in Appendix C conform to those limitations.

Gorsuch health and safety data has been impeded by the injunction in the present case. That injunction bars the release of the remaining data, including certain key studies on several pesticides and all of the data on one pesticide.

While *AFL-CIO v. Gorsuch, supra*, was pending, the *amici curiae* filed a second FOIA request for health and safety data, seeking information regarding five additional pesticides, including glyphosate ("Roundup"), a chemical produced by appellee. (A copy of this data request is attached to this brief as "Appendix D".)[6] In February, 1983, EPA issued a final determination that would have allowed access to the Roundup health and safety data. However, the injunction in this case issued before the release of that data, or any of the other data pertaining

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[6] The *amici curiae* are particularly interested in reviewing the health and safety data for Roundup because of the extremely high proportion of Roundup studies supplied by Industrial Biotest Laboratories ("IBT") an independent testing organization widely used to conduct government-required health and safety tests.

The vast majority of the 1,205 IBT health and safety studies supporting pesticide registrations have been found to be invalid due to wholesale fabrication of test data and fraudulent research. *See* EPA, *The IBT Review Program: Study Matrix* (May 10, 1983) ("IBT Study"). Three high-ranking IBT executives, including a former IBT employee subsequently employed by appellee Monsanto, have been convicted of fraud, including fabrication of data. *United States v. Calandra et al.*, No. 81 C.R. 235 (N.D. Ill. 1980).

With regard to Roundup particularly, EPA has now found 23 of 37 IBT-supplied studies on Roundup to be invalid, including six of eleven IBT-supplied "pivotal" studies—*viz.*, studies on carcinogenic, teratogenic, reproductive, and chronic feeding effects. Despite these deficiencies in the data supporting its registration, Roundup, like the other pesticides registered with the aid of IBT-supplied studies, remains on the market while replacement studies are being conducted. The *amici curiae* are interested both in examining the studies remaining after the elimination of the IBT data to determine whether those studies are adequate, standing alone, to indicate the safety to Roundup and, as well, to assess the replacement studies thus far supplied so as to avoid, through timely peer review, a repetition of the IBT debacle.

to the pesticides included in that request. Thus, because of that injunction the *amici curiae* have been prevented from submitting to independent scientists for their evaluation the health and safety data on this second group of pesticides as well.

This brief is therefore directed at demonstrating that, as applied to encourage the disclosure of health and safety pesticide data to non-commercial entities such as the *amici curiae* for the purpose of scientific peer review, § 10 of FIFRA does not in any sense work an uncompensated taking violative of the Fifth Amendment.[7] This conclusion is, as we go on to show, sufficient to invalidate the injunction issued with respect to § 10 of FIFRA generally, under established law limiting successful facial challenges based on the Takings Clause to the rare statute that necessarily works an uncompensated taking on every conceivable application.

SUMMARY OF ARGUMENT

I. The District Court concluded, on the basis of the record in this particular case, that EPA could adequately protect the public health and safety by evaluating pesticide health and safety data in secret, without any public involvement. On this basis, that court determined that disclosure of pesticide health and safety data does not promote a "public use" and that § 10 of FIFRA, for that reason alone, is invalid under the Takings Clause of the Fifth Amendment.

As the legislative history of § 10 conclusively demonstrates, Congress' assessment of EPA's ability to unilaterally determine the harmful effects of pesticides was quite different from the District Court's assessment. Both in 1978, when the present form of § 10 was enacted, and in 1982, when Congress refused to pass amendments limiting disclosure of pesticide health and safety data, Congress had substantial reason to doubt the adequacy

[7] This brief does not address the constitutionality of the data sharing provisions of § 3 of FIFRA, 7 U.S.C. § 136a, since those provisions in terms run in favor only of commercial competitors of a pesticide manufacturer.

of EPA review of pesticide health and safety data. Congress was aware that EPA regulation had failed in numerous instances to prevent pesticide poisoning and contamination. In addition, instances of data fabrication and misuse, undetected by EPA's review procedures, had begun to surface. By requiring the disclosure of pesticide health and safety data, Congress sought to enable independent scientists to review, both for basic integrity and for conceptual adequacy, the studies upon which the Agency had found the environmental and health effects of a particular pesticide not to be unreasonably detrimental. In addition, it was Congress' judgment that affected individuals should be able, with the assistance of organizations such as the *amici curiae*, to judge for themselves the safety of pesticides to which those individuals are exposed.

The disclosure provisions of § 10 are thus part of a well-considered scheme to protect the public and the environment from harm due to pesticide use. The District Court was not entitled to disregard, by a purported factual finding, or otherwise, Congress' conclusion as to the appropriate means of protecting against pesticide hazards. Thus, § 10 serves a "public use", as that term is used in Takings Clause jurisprudence, and the District Court's conclusion to the contrary cannot stand.

II. Identification of the public purpose underlying § 10 goes a long way toward demonstrating that disclosure of pesticide health and safety data to groups such as the *amici curiae* involves no compensable taking. While this Court has not settled upon any single test for separating a noncompensable economic regulation from a compensable taking, governmental regulation reasonably designed to prevent personal injury to individuals has long been understood to be at the core of the government's regulatory powers and therefore ordinarily not compensable. If there is any limit to this principle, it is in the rare circumstances, which certainly does *not* obtain here, in which the economic value of an owner's property interest is totally eliminated.

It is true that disclosure under § 10 is not *limited* to requests for health and safety data by noncommercial organizations committed to monitoring the hazards of pesticides. But the District Court did not purport to determine the likelihood and extent of the economic harm caused by the disclosure of any particular data regarding any specific pesticide to any distinct organization or individual. Except where it is clear that a statute regulating property denies *all* economically viable use of that property, such a facial invalidation of a statute under the Takings Clause is not proper. *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 295-96 (1981). Further, under this Court's precedents, a Tucker Act, 28 U.S.C. § 1491, remedy would be available should such a taking actually occur, and for that reason as well, § 10 with its important role in protecting against pesticide injuries, may not be enjoined.

ARGUMENT

I. AS A MEASURE ENACTED TO PROMOTE THE PUBLIC HEALTH AND SAFETY, § 10 OF FIFRA CLEARLY FURTHERS A "PUBLIC USE" WITHIN THE MEANING OF THE FIFTH AMENDMENT

As the District Court acknowledged, Congress enacted § 10 of FIFRA in 1978 as a health and safety measure central to the statute's regulatory scheme. J.S. App. 17a, 33a. Relying upon a legislative record containing numerous examples of EPA's failure to discover the chronic health effects of certain pesticides, Congress concluded that public review of the registration data would significantly reduce the likelihood that dangerous pesticides would be registered on the basis of false, incomplete or improperly analyzed data. The District Court, however, flatly rejected this congressional judgment. Instead, that court "found"—in direct conflict with the congressional findings and notwithstanding the extensive evidence before Congress that numerous pesticides registered by the EPA were causing cancer, sterility, genetic muta-

tions and birth defects—that EPA review was fully sufficient to protect the public from hazardous pesticides even if that review was made in total secrecy.[8] On this basis the District Court held that the public disclosure provisions of § 10 do not further a "public use" within the meaning of the Fifth Amendment, and are therefore "beyond Congress' regulatory powers." J.S. App., at 33a.

The District Court's mode of analysis is utterly inconsistent with the permissible scope of judicial review of congressional action. As this Court's cases make clear, the District Court, rather than relying upon its own view of the "record facts," should have deferred to the congressional findings, which amply support the conclusion that § 10 serves perhaps the most essential "public use" —that of protecting the health and, indeed, the lives of million of Americans.

1. The legislative history of § 10 leaves no doubt that Congress was gravely concerned about the dangers of pesticide exposure, and with EPA's repeated failure either to discover, or to warn the public, that many commonly-used pesticides have the potential for causing cancer, birth defects, damage to the central nervous system, genetic mutations and interference with biological reproduction. This legislative history also makes plain that Congress believed public disclosure of pesticide registration data to be absolutely necessary if the public is to be adequately protected from hidden pesticide dangers.

Congress first became aware of the extent of the public danger resulting from EPA's maladministration of FIFRA from a series of governmental reports prepared

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[8] The District Court thus found that "[t]he EPA has the ability to obtain independent scientific review and evaluation of the information, research and test data submitted to it under FIFRA . . . *without the necessity of public disclosure*," J.S. App., at 24a (emphasis added), and concluded that "[t]he public interest in seeing that safe and effective products are marketed is satisfied by the EPA's painstaking analysis of the complicated data submitted by Monsanto to register its products," J.S. App., at 33a. *See also* J.S. App., at 22a.

by congressional subcommittees, the Government Accounting Office ("GAO"), and EPA itself. These reports unanimously concluded that the pesticide registration program had been quite ineffective, and that EPA had failed in numerous instances to detect serious hazards associated with exposure to particular pesticides. Each of the reports recommended public oversight of EPA's registration decisionmaking as an essential measure to protect the public from exposure to hazardous pesticides.

The leading report, prepared by the Senate Subcommittee on Administrative Practice and Procedure, flatly stated that "the pesticide registration program is in a state of chaos." Subcomm. on Admin. Practice and Procedure, Senate Judiciary Comm., *The Environmental Protection Agency and the Regulation of Pesticides*, 94th Cong., 2d Sess., at 23 (Comm. Print 1976). While this Report directed numerous specific criticisms at the Agency, its primary concerns were that the EPA had unwisely delegated the task of data review to inexperienced agency personnel, had "failed to . . . respond to early and repeated warnings that the data it was relying upon were faulty and incomplete," had "failed to consider previous critiques of safety testing data in its own files," and had "failed to take corrective action designed to discover and supplement faulty data." *Id.*, at 19-20, 23, 25, 34. For these reasons, the Report concluded that "the American people cannot be reasonably assured that the Federal Government is protecting them from pesticides that pose a serious threat to their health" (*id.*, at 23), and recommended public disclosure of pesticide registration data to permit public review and oversight of the pesticide registration program:

> [S]crutiny of the data over and above what EPA can provide will sharpen the analyses and improve the regulatory effort. It might also provide some incentive for the companies to develop more accurate data and the EPA to improve the quality of its own internal reviews. [*Id.*, at 49.]

A second report considered by Congress prior to the enactment of § 10 in its present form was prepared by EPA's Office of Pesticide Programs. *See* EPA Office of Pesticide Programs, *FIFRA: Impact on the Industry*, reprinted in S. Rep. No. 95-334, 95th Cong., 1st Sess. (July 6, 1977). This internal EPA Report acknowledged that "the Agency has, in fact, been negligent in its public duty," and also acknowledged that serious questions had been raised about the Agency's ability to adequately protect the public health and safety. Echoing the recommendation in the Senate Subcommittee Report, this EPA Report then urged Congress

> [to permit] interested members of the public to examine the actual data which is submitted in support of the safety and efficacy of registered pesticides [in order] to encourage public understanding and criticism of Agency decision-making as well as to increase the knowledge of risks and benefits of pesticide use. [*Id.*, at 41 (emphasis added).] [9]

Throughout Congress' consideration of the 1978 amendments, EPA reiterated its recommendation that pesticide health and safety data should be disclosed:

> We believe that the right of public access to decision foundations is vitally important. *Almost all our decisions concerning pesticides are based on the meaning of test data; public awareness of the complexity of these issues is critical to public acceptance of our risk/benefit approach. Public scrutiny and criticism can also improve the quality and thoroughness of our*

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[9] *See also* Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, "Cancer-Causing Chemicals in Food," 95th Cong., 2d Sess., at 18 (Comm. Print No. 95-67, December 1978) (concluding that "many pesticides which result in chemical residues in food and animal feed have *never* been tested for their potential to cause cancer, birth defects, and genetic mutations"); General Accounting Office, "Delays and Unresolved Issues Plague New Pesticide Protection Programs," at 19 (1980) (noting that "the public is exposed daily to many pesticides which are not supported by animal and environmental safety studies").

decision-making. [Hearings Before the House Agriculture Subcommittee on Departmental Investigations, Oversight and Research, at 148 (April 27, 1977) (statement of Douglas M. Costle) (emphasis added), *quoted in* S. Rep. No. 95-334, 95th Cong., 1st Sess., at 72 (July 6, 1977).]

See also Hearings Before the Senate Agricultural Subcommittee on Research and General Legislation, at 43-44 (June 9, 1977) (remarks of Douglas M. Costle). It was therefore EPA's stated position—although the District Court never took notice of the fact—that the Agency could more effectively regulate the safety of pesticides if the Agency did not "deny farmers or academicians or any person who desires to interpret the wisdom of regulatory decisions the objective information which the Administrator has [used] to arrive at the subjective risk/benefit balance called for in FIFRA." *Id.*, at 619 (June 9, 1977 letter from Administrator Costle to Cong. Foley, Chairman of the House Committee on Agriculture).

Accordingly, when the 1978 FIFRA amendments were debated, numerous Congressmen stressed the urgent need for public oversight of the pesticide registration program—both to ensure that industry data and methodology conformed to contemporary standards of scientific accuracy, and to provide the public with the basic information necessary to make the subjective determination whether the risk of exposure to a particular pesticide is unacceptably high. Sen. Kennedy, for example, speaking in support of the Senate bill, noted:

> Of particular significance in the bill as reported is the provision for public disclosure of the safety testing data on pesticides submitted to the EPA by industry. While providing for sufficient protection of "trade secret" information relating to individual pesticide products, *this provision will allow for public scrutiny of the EPA's regulatory effort. And I submit that the EPA needs all the help it can get in performing this very difficult regulatory task.* [123 Cong. Rec. 25711 (July 29, 1977) (remarks of Sen. Kennedy) (emphasis added).]

Similarly, Cong. Fithian stated, in support of the comparable House bill:

> The public has an inherent right to know about the potential damaging aspects or cancer-causing ingredients in all pesticides produced in this country and should be given the information about a pesticide's impact on man and his environment. [123 Cong. Rec. 36008 (Oct. 31, 1977) (remarks of Cong. Fithian).]

See also 123 Cong. Rec. 36006 (Oct. 31, 1977) (remarks of Cong. Senior); 123 Cong. Rec. 35999 (October 31, 1977) (remarks of Cong. Maguire); 123 Cong. Rec. 36011, October 31, 1977 (remarks of Cong. Moss). These expressions of concern, and this belief that public disclosure would promote the goal of protecting public health and safety, were reiterated in the pertinent House and Senate Reports. *See, e.g.*, H. Rep. No. 95-663, 95th Cong., 1st Sess., at 18 (October 5, 1977) (referring to the Act's recognition of "the legitimate right of the public to know the basis for agency decision"); S. Rep. No. 95-334, 95th Cong., 1st Sess., at 13 (July 6, 1977) (noting that "[i]n areas dealing with potentially dangerous materials such as pesticides, . . . there is a substantial public interest in public disclosure of facts concerning their production and uses").

Despite Congress' enactment of present § 10 in 1978, its goal of encouraging independent scientific peer review and public oversight of EPA decisionmaking was long delayed. A series of lawsuits filed by pesticide manufacturers succeeded in enjoining the disclosure of any pesticide health and safety data for a period of years.[10] Moreover, even after those injunctions were lifted, the EPA refused to produce data that was covered by § 10, and the *amici curiae* had to file a lawsuit, *AFL-CIO v. Gorsuch*, *supra*, to obtain such disclosure. Not

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[10] *See, e.g., Union Carbide Agricultural Products Co. v. Costle*, 632 F.2d 1014 (2d Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (reversing district court injunction); *American Cynamid Co. v. Gorsuch*, U.S.D.C. D.N.J. No. 77-226 (filed Feb. 3, 1977).

surprisingly, the public health crisis that had been the focus of congressional concern in 1978 considerably worsened during this period. And when Congress again addressed the public disclosure issue, in response to an unsuccessful industry-backed attempt to water down the public disclosure provision in 1982, the legislature expressed even more clearly the urgent public need for independent review of EPA decisionmaking.[11] Indeed, Congress refused to restrict the public disclosure provisions enacted in 1978 largely because the legislature had become aware of even more compelling evidence—all apparently ignored by the District Court—that EPA was not fulfilling its statutory mandate to protect the public health and safety.

The 1982 debates contain powerful examples of EPA's utter failure to protect the public from exposure to hidden pesticide dangers. Cong. Heftel, for example, criticized the Agency's failure to notify the public of the danger of heptachlor exposure, noting that this pesticide

> was used to spray pineapple crops [in Hawaii] and the public did not know that the remains, called pineapple chop, were being fed to dairy cows from which the people got their milk supply, which in turn was found to be contaminated at four times

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[11] The unsuccessful 1982 amendments would have prohibited disclosure of all health and safety studies that involve "innovative" methodology or technology, a potentially crippling restriction. The House defeated this provision (*see* 128 Cong. Rec. H5690-93 (daily ed., Aug. 11, 1982), at the same time passing an amendment permitting private rights of action for injunctive relief under FIFRA (*id.*). These amendments were not acted on by the Senate and the result was retention of the 1978 law. An earlier industry-backed amendment, which would have permitted public access only to *summaries* of the health and safety data submitted to EPA by pesticide manufacturers, and which would have permitted public review of these summaries only in specified reading rooms, never even passed Committee. *See generally* Safir & Davis, *Disclosure of Pesticide Safety Data: A Viable Compromise at Last?*, 12 ELR 15017, 15022-24 (1982).

> the maximum allowable level under the law, pertaining to heptachlor. 128 Cong. Rec. H5653 (daily ed., Aug. 11, 1982) (remarks of Cong. Heftel).]

The pesticide toxaphene was the focus of Cong. Yates' concern:

> Toxaphene is a chemical that is used in Mississippi, Louisiana, in the Southern States as a spray for the growing of cotton. That in itself sounds entirely harmless; but it does not stay in place. What happens is that toxaphene, which is made up of a number of compounds, is very much like DDT in the respect that it has a very strong life. The toxaphene that is sprayed on crops in the Southern States is lifted by the winds and carried for distances of over 1,000 miles, to the city of Chicago, for one place, 1,000 miles away. Then it is dropped by rainfall onto the city of Chicago, it is dropped on all the communities surrounding the Great Lakes, and it is dropped into the Great Lakes themselves. . . . It is in the food chain that is being used by people all over the country. [128 Cong. Rec. H5670 (daily ed. Aug. 11, 1982) (remarks of Cong. Yates).]

Similarly, Cong. Carney complained of the agency's failure to warn the public of the dangers resulting from exposure to temik:

> In 1970, a toxic pesticide produced by Union Carbide under the trade name Temik was first registered for crop use. It was reported in 1970 that soil residue data [submitted to EPA] indicated that this pesticide and its metabolites would rapidly decay and that movement of this chemical into the groundwater would not occur. In 1979, however, residents of my district were shocked to find their drinking water wells contaminated. Upon request, Union Carbide tested 10,000 wells, finding that 25 percent of those wells contained levels above the New York State guidelines. [128 Cong. Rec. H5691 (daily ed., Aug. 11, 1982) (remarks of Cong. Carney).]

These episodes of pesticide poisoning were brought to Congress' attention in 1982 to reemphasize the critical

need for public disclosure and independent scientific review of pesticide registration data. This need was perhaps most clearly described by Cong. Gore, who used an example of PBB contamination to illustrate the importance of public disclosure of health and safety data:

> We had this PBB tragedy in Michigan. . . . Before the mistake was discovered, hundreds of thousands of livestock were contaminated and consumers had ingested large amounts of products contaminated with PBB. *Yet even after the mistake was discovered, farmers and consumers were faced with substantial fears and uncertainties because little information existed concerning the health effects of PBB and because* test methods available for analyzing PBB's were limited, and *little information was available about how extensively it could get into the environment.* Now, if that tragedy had involved the accidental contamination of cattle feed with a pesticide instead of PBB and this provision [seeking to amend the public disclosure provisions of FIFRA] applied, *it would have significantly impaired the public's ability to obtain sound information concerning the potential risk posed by the pesticide.* [128 Cong. Rec. H5688 (daily ed., Aug. 11, 1982) (remarks of Cong. Gore) (emphasis added).]

Cong. Gore was not the only Congressman to articulate the public purposes that would be served permitting public disclosure of pesticide health and safety registration data. Cong. Levitas, for example, who strongly opposed any limitation on the public's right to review such data, reminded his colleague that Congress had enacted § 10

> to make available, for complete use and discussion on its validity and accuracy, information relating to the health and safety effects of products which . . . may have tremendous implications with respect to human health when introduced into the environment, into the food chain and into the bodies of individuals. . . . [*I*]*n order to ascertain where there have been flawed tests, where there have been inappro-*

> *priate protocols runs or where there has been a failure to determine the environmental fate of a particular chemical, the public and scientific community need full access and open discussion of this information.* . . . Health and safety information should not be held to close to the chest as a proprietary matter, because you may find that something down the road can protect someone's life. [128 Cong. Rec., at H5679-80 (daily ed., Aug. 11, 1982) (remarks of Cong. Levitas) (emphasis added).]

Cong. Levitas also remarked that public disclosure was necessary to protect

> the right of the people and the scientific community to have a full opportunity to assess, to discuss, to challenge, and to question the information that has been developed by a company and submitted to EPA to establish that their product is safe to use. *We are talking about the right of the public and the scientific community to determine whether there are any flaws or defects or invalidity in the protocol . . . with respect to health and safety information.* [128 Cong. Rec. H5679 (daily ed., Aug. 11, 1982) (remarks of Cong. Levitas) (emphasis added).] [12]

Accord 128 Cong. Rec. H5668, H5683 (daily ed., Aug. 11, 1982) (remarks of Cong. Schneider); *id.* at H5683 (re-

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[12] In support of his position, Cong. Levitas entered into the Congressional Record a letter written by 41 distinguished scientists explaining why independent peer review is scientifically important. In part, that letter stated:

> . . . [W]*ithout this peer review, as allowed under the 1978 Act, there is no way of knowing whether testing on these substances has been conducted thoroughly and the data honestly presented to the regulating agencies charged with protecting the public's safety.* That is the crucial issue, in our view. . . . It is no secret that some premarket testing in recent years has been conducted under less-than-rigorous standards, resulting in charges that testing was incomplete, inadequate, or the conclusions fraudulently reached. Premarket test data—the most crucial measure of a substance's potential effects on humans and the environment—must be available to the public. [128 Cong. Rec. H5681 (daily ed., Aug. 11, 1982) (emphasis added).]

marks of Cong. Hollenbeck); *id.* at H5689 (remarks of Cong. Scheuer).

3. As these excerpts from the legislative record make clear, Congress enacted § 10 to promote two related objectives.[13] First, Congress believed that public disclosure, and independent scientific review, would minimize the risk that EPA's registration determinations would be based upon false, faulty or incomplete data or upon unsound or inadequate scientific methodology and analysis. Independent peer review is at the core of the scientific process because such review permits the hypotheses, data and conclusions of one scientist to be scrutinized, debated, replicated and corrected by the scientific community at large. Peer review also serves the prophylactic effect of inducing industry and the Agency to be more careful and more thorough in presenting their data and conclusions, knowing that these data and conclusions will later be subjected to rigorous scientific peer review. *See* Letter from FDA Commissioner Donald Kennedy to Senator Edward M. Kennedy (May 5, 1978), reprinted in Drug Regulation Reform of 1978: Hearings on S. 2755 Before the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources, 95th Cong., 2d Sess., at 841-42 (1978).

Second, Congress believed that public disclosure would permit the millions of individuals in this country who are regularly exposed to pesticides—including workers in pesticide manufacturing plants, farmworkers and consumers—*to decide for themselves* whether the risks of long-term exposure to a particular pesticide, including such chronic health effects as cancer, sterility, genetic mutations or birth defects, are unacceptably high. Thus, even where EPA has decided that a particular pesticide will not cause "unreasonable adverse effects" to the environment within the meaning of 7 U.S.C. § 136a(c)

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[13] *See also* McGarrity and Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies, supra*, 93 Harv. L. Rev., at 840-48.

(5)(D), Congress recognized that individual workers may nonetheless decide, if there is access to an independent scientific evaluation of the underlying data, that the risk of chronic health effects resulting from exposure to a particular pesticide is still unreasonably high, notwithstanding EPA's *subjective* judgment. On the basis of such a determination, such individuals could decide to change jobs, to change products, or to take other steps to reduce their exposure to a particular pesticide.

The District Court had no right to second-guess these legislative determinations. This Court has long held that the courts must defer to Congress when the legislature determines that a particular statutory program is likely to further the public health, safety, morals or general welfare, or otherwise to promote a "public use." This deference is perhaps best exemplified by *Berman v. Parker*, 348 U.S. 26 (1954), which rejected a challenge, on public use grounds, to the constitutionality of the District of Columbia Redevelopment Act. Plaintiffs in *Berman* were department store owners in southwest Washington who contended that Congress had no power to enact a redevelopment scheme that permitted their property to be sold to a private developer as part of the general District of Columbia Redevelopment Plan. Relying on long-established case law, the Court unanimously explained:

> We deal . . . with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, [and] *when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.* In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. *The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.* [348 U.S., at 32 (emphasis added).]

Where "Congress has declared the [statutory] purpose to be a public use, by implication if not by express words, . . . [i]ts decision is entitled to deference until it is shown to involve an impossibility." *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925). As with other challenges to the legislature's efforts to accomodate the burdens and benefits of economic life, judicial inquiry into the legislative judgments underlying a statute like FIFRA "must be restricted to the issue whether [there exists] any state of facts either known or which could reasonably be assumed . . . [to] support [them]." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). As this Court stated in *Firemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 139 (1968) (emphasis added):

> *The District Court's responsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion* or even to reject the legislative judgment on the basis that, without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than . . . "pure speculation."

Since § 10 is based on a "known . . . state of facts" and Congress' "decision" on those facts does not "involve an impossibility," the District Court was required to defer to the congressional judgment that § 10 furthers a "public use."

II. THE PURPOSE OF § 10 OF FIFRA IS TO PREVENT THE SALE OF PRODUCTS LIKELY TO HARM MEMBERS OF THE PUBLIC AND THAT PROVISION THEREFORE DOES NOT ON ITS FACE WORK AN UNCOMPENSATED TAKING

1. Ordinarily, establishing that the government has a legitimate public purpose is but a threshold inquiry in a Takings Clause case. Even where the government's goal *is* entirely permissible, the "Fifth Amendment's guarantee [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness

and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 70, 79 (1960). In this case, however, the governmental purposes underlying § 10 of FIFRA go a long way toward establishing that this case, like *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), is *not* one in which the "economic injuries caused by public action [should] be compensated by the government." *Id.* at 124.[14]

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[14] The analysis that follows assumes that appellee Monsanto retains a compensable property interest in its health and safety data even after submitting that data to the government to obtain the right to sell pesticides. We note, however, that this is at least a dubious proposition, even with respect to health and safety data filed with the government before the 1978 FIFRA amendments. (As to any data that may have been filed *after* 1978, the conclusion seems inescapable that Monsanto relinquished any interest the Company may have had in secrecy by submitting the data to EPA in the face of explicit statutory notice that the data would be disclosed to the public.) In fact, Monsanto's position with regard to post-1978 data is no different than that of a company applying for a patent on the express understanding that the *quid pro quo* for obtaining a seventeen-year monopoly is "refrain[ing] from keeping his invention a trade secret [by] disclos[ing] [the] process or data in sufficient detail to enable one skilled in the art to practice the invention once the . . . monopoly has expired." *Universal Oil Products v. Globe Oil Refining Co.*, 322 U.S. 471 (1944).

Even if it is taken as agreed or established (J.S. App., at 30a-31a) that the required data constitutes a trade secret under the Restatement of Torts, that does not, as the District Court believed, simultaneously establish that the data constitutes property of the kind for which the government must provide compensation under the Takings Clause. The trade secret definition relied upon by the District Court (J.S. App., at 29a) appears in the Restatement of *Torts*, not of *Property*. A cause of action based on appropriation of a trade secret is based on breach of a confidential relationship or upon improperly obtaining the secret, and not simply upon disclosure of information a company would rather keep secret. *See* Restatement of Torts § 757; *See also E.I. DuPont De Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917) (the "word property as applied to . . . trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. . . . The property may be denied but the [breach of] confidence cannot be"); *Kewanee*

For, where the purpose of a statute is, as here, to prevent tangible, physical injuries to people due to exposure to a particular product or property, this Court has had little difficulty, despite its inability otherwise to settle upon

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Oil Co. v. Bicron Corp., 416 U.S. 470, 487 (role of trade secret protection is to prevent industrial espionage); *see id.*, at 497 (Douglas, J., dissenting) ("[a] trade secret, unlike a patent, has no property dimension"). Indeed, "the term 'trade secrets' has been defined both broadly and narrowly at common law, sometimes in ways which would encompass health and safety data and sometimes as limited to a 'plan appliance, formula, or process . . . used in . . . making, preparing, compounding, treating or processing articles.'" *Public Citizen Health Research Group v. Food and Drug Administration*, 704 F.2d 1280, 1286 (D.C. Cir. 1983) (quoting the construction of the Federal Trade Secrets Act, now 18 U.S.C. § 1905, in *United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Commission*, 6 F.2d 491, 495 (D.C. Cir. 1925)).

Thus, it does not violate the Takings Clause for a state to alter or eliminate the protection accorded trade secrets under state law.

> A person has no property right, no vested interest, in any rule of the common law . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstance. [*Munn v. Illinois*, 94 U.S. 113, 134 (1877). *See also Martinez v. California*, 444 U.S. 277, 282 (1980).]

And any suggestion that the federal government has a lesser authority in this regard is belied by the Commerce Clause and by the Supremacy Clause. Such a proposition is particularly anomalous in light of the fact that it was conclusively established only in 1974 that state trade secret protection is valid despite the somewhat similar protections accorded by the federal patent laws. *Kewanee Oil Co., supra.* To concur in the District Court's view of the relationship between state trade secret protections and the Takings Clause would be to suppose that, had the decision in *Kewanee Oil* gone the other way, the federal government could be accused of "taking", in violation of the Fifth Amendment, every trade secret in the nation. *Compare Compco Corp. v. Day Brite Lighting Co.*, 376 U.S. 234 (1964); *Sears Roebuck & Co. v. Stiffel*, 376 U.S. 225 (1964) (both holding, without indicating any Takings Clause problem, that a state cause of action for unfair competition by marketing an exact copy of a product neither patented nor copyrighted *does* interfere with federal patent and copyright policy and *is* therefore preempted).

a "set formula" for determining when a regulatory taking has occurred, in concluding that "justice and fairness are served by allowing any economic losses due to such regulation to fall upon the individuals whose activities are creating the risk of injury." *Penn Central, supra*, 438 U.S., at 124.

As long ago as 1887, the Court enunciated this core principle:

> [A]ll property in this country as held under the implied obligation that the owner's use of it shall not be injurious to the community . . . . A prohibition . . . upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests. . . . The power . . . of prohibiting . . . such use by individuals of their property as will be prejudicial to the health . . . of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted . . . to inflict injury upon the community. [*Mugler v. Kansas*, 123 U.S. 623, 665, 668-69 (1887). *See also*, e.g., *Erie R.R. v. Bd. of Public Utility Comm'rs*, 254 U.S. 394, 410-11 (1921); *Penn Central, supra* at 145 (Rehnquist, J., dissenting).][15]

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[15] The majority opinion in *Penn Central* rejects the characterization of certain cases relied upon by the dissent as illustrative of the rule that harmful uses of property may be regulated without implicating Takings Clause considerations (438 U.S., at 134 n.30), and rejects as well the dissent's implication that only where the regulation is of injurious uses of property is the government entitled to rely on its police powers to deny compensation to those

Applying this principle, Congress could have determined that the frequency of after-the-fact discovery of pesticide-caused injuries justified banning all pesticides or severely limiting their use. Instead, Congress endeavored to separate out the safe from the unsafe pesticide by imposing upon those desiring to sell pesticides the responsibility for establishing their safety through extensive, costly prior testing.

Significantly, appellees do *not* challenge this requirement, despite its substantial economic costs, or claim that if the public insists on being certain that a particular pesticide is safe, the public must pay the cost of so demonstrating. In fact, any such claim would plainly be futile. Even before *Mugler v. Kansas* this Court recognized the validity of a statute imposing upon the owners of potentially dangerous properties the cost of establishing that those properties do not present a health hazard. In a case involving a statute requiring all ships entering the port of New Orleans to undergo a sanitary inspection at a quarantine station and to pay a fee to defray the costs of the inspection this Court stated:

> If the law did not make this provision for assuming her freedom from infection, it would be compelled to enact more stringent and more expensive penalties against the vessel itself . . . The law now says that you must submit to this examination [and] . . . [f]or this examination and fumigation you must pay. The danger comes from you, and though it may turn out that in your case there *is* no danger,

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economically affected. But neither *Penn Central* nor the law review article upon which the relevant portion of that opinion relies questions the vitality of *Mugler v. Kansas* as applied to *true* safety regulations, or of the principle *Mugler* announces. *See* Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 48-50 (1964). *See also* Michelman, *Property Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165, 1236 (1980) (a harm-prevention test under the Takings Clause has a "core of truth" even though it is sometimes difficult to distinguish situations in which the government is preventing a harm from those in which the government is promoting a benefit).

> yet as you belong to a class from which all this kind of injury comes . . . [i]t seems to us that this is . . . a fair charge against the vessel. [*Morgan v. Louisiana*, 118 U.S. 455, 461-462 (1886) (emphasis in original).]

In FIFRA, Congress decided that the government should not conduct the health and safety testing itself but, instead, should require pesticide manufacturers to do so, while at the same time forbidding the manufacturers to keep secret the results of their tests. This disclosure requirement, as we have seen, has its own health justification, since, in Congress' view, adequate evaluation of the health and safety data requires public participation. No reason appears why the imposition of the lesser economic costs on pesticide manufacturers potentially resulting from this provision is compensable although much greater restrictions on the exploitation of property may be imposed, retroactively or prospectively, without compensation when the legislature, as here, is seeking to prevent an injurious use of property. Even if purported trade secrets *are* property for purposes of the Takings Clause, that property is not entitled to *greater* protection than other forms of property; consequently, it can no more be an uncompensated taking for Congress to require disclosure of health and safety data produced by pesticide manufacturers, on the ground that keeping that data secret entails dangers to the public health, than it is for Congress to regulate, on a similar basis, the purposes for which a particular pesticide may be sold.[16]

There is, it is true, at least one case in this Court which arguably involves regulation of a life-threatening use of property, and nonetheless holds that a compensa-

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[16] If further proof of the proposition that purported trade secrets are not entitled to *greater* protection from police power regulation than traditional forms of property is necessary, the venerable labelling cases provide the necessary proof. *Savage v. Jones*, 225 U.S. 501 (1912); *Corn Products Refining Co. v. Eddy*, 249 U.S. 427 (1918); *National Fertilizer Assn. v. Bradley*, 301 U.S. 178 (1937).

ble taking occurred. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *see id.*, at 417 (Brandeis, J., dissenting). *Mahon* may well have turned on a conclusion that no real dangers to people, as opposed to property, was at stake, or on the peculiar facts concerning the relationship between the plaintiff's and defendant's property rights of that case. But even if *Mahon* is read, instead, to establish a general Takings Clause rule for regulation of injurious or high-risk property, that case established only that when *all* economically viable use of distinct property is extinguished, retroactively, through regulation, there must be compensation. *See Penn Central, supra*, 438 U.S., at 127-28.

Plainly, this case does not come close to presenting such a limiting circumstance. Appellee Monsanto generated its health and safety data "primarily for registration purposes". J.S. App., at 21a. The data remains available to Monsanto for that primary purpose and, as well, for purposes such as protecting its workers, defending product liability lawsuits, and obtaining registrations in foreign countries. J.S. App., at 21a.[17] Thus, even if the economic value to Monsanto of its health and safety data is, as a whole, less now than before 1978, that value has certainly not been entirely, or even predominantly, extinguished, and *Mahon*, however construed, does not establish that a taking has occurred here.[18]

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[17] It is possible, of course, that because of disclosure Monsanto's data will be found faulty, and the registration of one or more pesticides will be withdrawn. But the possibility that the data generated for registration purposes does not satisfy the statutory health and safety requirements is a risk Monsanto assumed when the Company decided to invest in health and safety research to begin with, not a risk created by the disclosure requirements; and there can be no doubt that a proper registration refusal is not a compensable taking.

[18] It should also be recognized that the economic loss about which Monsanto most loudly complains—*viz.*, loss of the competitive advantage which exploitation of its health and safety data represents—is an advantage created in the first place largely by the FIFRA registration requirements. Absent those requirements, no

2. We recognize that § 10 does not limit disclosure to the type of health and safety data that the *amici curiae* have been seeking, nor are such groups the only kinds of organizations entitled to secure disclosure. For two separate reasons, however, the remote possibility that a particular disclosure request may eventually result in economic harm to appellee Monsanto cannot justify the broad injunction issued below, or even an injunction limiting the kinds of information that may be disclosed or the identity of permissible recipients.

In the first place, despite the voluminous record compiled in this case, the District Court did not focus upon the precise degree and kind of economic injury Monsanto is likely to suffer from any particular data disclosure request. Instead, that court held that there was "an immediate taking of Monsanto's property as of the passage of the amendments to FIFRA on September 30, 1978." J.S. App. at 36a. Thus, this case is structurally identical to *Hodel v. Virginia Mining & Recl. Assn.*, 452 U.S. 264 (1981). In that case, although the trial court conducted a lengthy trial (*id.*, at 274), there was no attempt to adjudicate any concrete controversy concerning the application of the Surface Mining Act "to particular surface mining operations or . . . [to] specific parcels of land." *Id.*, at 295. This Court noted that because Takings Clause challenges often involve "essentially ad hoc, factual inquiries", such challenges must ordinarily "be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances."

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major barrier to entry into the pesticide market would exist, and small companies able to afford basic development costs but not the very high costs of health and safety testing, would already be competing (albeit unsafely) with the large companies such as Monsanto. Furthermore, there is grave doubt concerning whether relative competitive disadvantage is compensable in any event under the Takings Clause, which ordinarily provides compensation only for the sale value of property, and not for collateral consequences of the loss of property. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

Id. Where, as in *Hodel* and here, there is no such specific focus, "the only issue properly before . . . this Court . . . is whether the 'mere enactment' of the . . . Act constitutes a taking." *Id.*, quoting *Agins v. Tiburon*, 417 U.S. 255, 260 (1980). And, where that is the question, the statute may be voided only if it "denies an owner economically viable use of his [property]'." *Id.*, at 296, quoting *Agins*, 417 U.S., at 260. Since, as we have already established (pp. 27-28 & ns. 17 & 18, *supra*) that is no more than the case here than it was in *Hodel* or *Agins*, the facial challenge must fail.

Further, even with respect to a particular disclosure request, an injunction prohibiting disclosure under the Takings Clause is inappropriate unless a registrant's cause of action for compensation from the United States under the Tucker Act, 28 U.S.C. § 1491, has been affirmatively *withdrawn* by FIFRA. *Railroad Reorganization Act Cases*, 419 U.S. 102, 127 (1974); *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978); *Penn Central*, *supra*, 438 U.S., at 94, n. 39. The District Court found the Tucker Act unavailable, holding that the compensation provisions of § 3 of FIFRA, 7 U.S.C. § 136a, were intended to be the sole source of compensation for any compensable injury due to the operation of either § 10 or § 3 of that Act. J.S. App. 35a. This conclusion cannot be squared with the approach of the *Railroad Reorganization Act Cases* even with respect to § 3. For the *Railroad Reorganization Act Cases* reject any inference, such as that drawn by the District Court in this case, that by providing some compensation scheme Congress signals an intent to withdraw the Tucker Act cause of action. With respect to § 10, moreover, the conclusion is even more untenable. FIFRA provides *no* compensation scheme for disclosure of registration data alone, as opposed to its *use* for registration purposes, nor does the compensation scheme in § 3 depend upon any disclosure under § 10 having occurred. Since FIFRA is entirely silent on the question of compensation for any economic injuries due to disclosure of such data, there is no basis

for implying that Congress intended to forbid a cause of action for constitutional damages, if any, in the Court of Claims. For this reason as well, the total injunction issued below upon the disclosure Congress believed vital to assuring the public protection from pesticide injuries is improper.

CONCLUSION

For the above stated reasons, the decision below should be reversed.

Respectfully submitted,

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* With the assistance of Lawrie Mott, M.S.

APPENDICES

APPENDIX A

Roundup *

CHEMICAL NAME: isopropylamine salt of *N*-(phosphonomethyl) glycine.

COMMON NAME: *glyphosate* isopropylamine salt (ANSI, WSSA).

ACTION: Non-selective, postemergence herbicide.

TOXICITY: Acute oral LD_{50}, 4300 mg kg (*glyphosate*). Isopropylamine salt, 4900 mg/kg (*Roundup* * formulation).

SIGNAL WORD: WARNING.

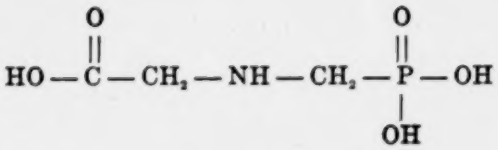
APPLICATION: For control of many annual and perennial grasses and broadleaf weeds plus many tree and woody brush species in cropland and noncrop sites. A foliar-applied, translocated herbicide, it may be applied spring, summer, or fall to undesirable vegetation by boom equipment, hand-held and high volume equipment, and selective equipment such as recirculating sprayers, rollers, and wipers throughout the U.S. and, in some states, by aerial application equipment in forestry. *Roundup* * is nonselective and may be applied to undesirable species in four ways in the culture of desirable species: (1.) Prior to the emergence of the following desirable species: alfalfa, edible beans, grasses for seed production, green or English peas, and turfgrasses. (2.) Prior to emergence or within (as a directed spray or spot treatment) a growing stand of the following desirable species: apples, asparagus, barley, citrus, cotton, corn, grapes, nut crops, cherries, oats, ornamentals, pears, sorghum (milo), soybeans, sugarcane, and wheat. (3.) Within established avocado groves. (4.) Through selective equipment in cotton or soybeans.

It may also be applied by conventional means or through selective equipment for general weed control in noncrop

areas such as industrial, recreational, and public areas such as airports, ditch banks, dry ditches and canals, fencerows, golf courses, highways, industrial plant sites, rights-of-way, etc., and in farmstead weed control.

FORMULATION: *Roundup* * is sold as an aqueous solution of the *isopropylamine salt* of *glyphosate* and wetting agents.

COMBINATIONS: *Roundup* * may be tank mixed with *Lasso* *, *atrazine*, and *Princep* * for use in minimum tillage systems for corn and with *Lasso* *, *Lorox* *, *Lexone* *, and *Sencor* * for use in minimum tillage systems for soybeans.



Glyphosate

BP: Monsanto Agricultural Products Co., a unit of Monsanto Co.

APPENDIX B

NATURAL RESOURCES DEFENSE COUNCIL, INC.
25 Kearny Street
San Francisco, California 94108
415 421-6521

Washington Office
725 I Street, N.W.
Suite 600
Washington, D.C. 20006
202 223-8210

New York Office
122 East 42nd Street
New York, N.Y. 10168
212 949-0049

February 2, 1982

VIA EXPRESS MAIL
RETURN RECEIPT REQUESTED

Anne Gorsuch, Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

FOI Officer
A-101, Room 1132
401 M Street, S.W.
Washington, D.C. 20460

Dear Sir/Madam:

This is a request under the Freedom of Information Act (FOIA), as amended, (5 U.S.C. § 552) in conjunction with § 10(c) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 U.S.C. § 136). It is made on behalf of the following organizations: American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); Consumers Union of the United States, Inc.; Natural Resources Defense Council, Inc.; Environmental Defense Fund; The Sierra Club; Friends of the Earth; International Chemical Workers Union,

AFL-CIO; National Coalition Against Misuse of Pesticides; California Agrarian Action Project; and California Rural Legal Assistance.

On behalf of their members, these organizations request health and safety data retrievable from the files of the Environmental Protection Agency for the following pesticides: captan, toxaphene, ethylene debromide (EDB), dimethoate, temik, benomyl, carbon disulfide, carbon tetrachloride, TOK, lindane, and methyl bromide. In particular, we request all documents relating to carcinogenicity, mutagenicity, neurotoxicity, and teratogenicity and other reproductive effects of the above-named pesticides. In addition, we request copies of any reports provided by TRW Corporation concerning alternatives to 2, 4, 5-T. With regard to any studies that have been published on the above-mentioned pesticides, we request citations of the studies in lieu of the actual documents.

Under the Freedom of Information Act and FIFRA, we are entitled to all of the requested materials. While FOIA contains an exemption for certain matters that are trade secrets, Congress specifically provided in the 1978 amendments to FIFRA, that the materials being requested here are not trade secrets, and that members of the public have the right to obtain pesticide health and safety data on the acute and chronic effects from pesticide exposure.

However, if all or any part of this request is denied, we request, as the Act requires, a list of the specific statutory exemptions upon which the EPA is relying to withhold information. If the EPA determines that some portions of the requested material are exempt, we request, in accordance with the Act, that we be provided with the remaining non-exempt portions. We, of course, reserve the right to appeal any decision to withhold information and expect that you will list the address and office where such an appeal can be sent.

The requesting organizations are prepared, if necessary, to pay reasonable costs for locating and reproducing the requested documents. However, pursuant to amendments to the FOIA which provide for a reduction or waiver of fees if it is "in the public interest because furnishing the information can be considered as primarily benefiting the public," we request such a waiver of fees. The members and clients of the requesting organizations regularly are exposed to these pesticides, risking adverse health and safety effects. These documents are necessary in order to independently review the sufficiency of the tests performed on these chemical agents and thereby advise and protect our members concerning potential health risks, such as cancer, birth defects, and genetic mutations.

In addition, the health and safety properties of these pesticides is a matter of ongoing public debate. Release of this information will contribute to this debate by increasing public awareness of the possible adverse effects resulting from continued exposure to these toxic substances. Further, it is our intention, once this data is received, to have it reviewed by a body of independent scientists to determine whether the tests involved were adequately performed. Thus, disclosure of the data is required for the advancement of scientific research and to better protect the public and our members by ensuring that the health and safety tests here conducted by the chemical industry were adequate for that purpose. Finally, all of the organizations making this request are non-profit, will not benefit financially from this information, and seek to obtain it solely to promote the public interest and wellbeing.

If the Agency refuses to waive fees and if the costs exceed $1,000, we request permission to review the records that are responsive to this request and then select those documents that we want copied.

As provided in the Freedom of Information Act, we expect the Agency's response within ten working days. If you need any further information regarding this request, please contact Al Meyerhoff by telephone at 415/421-6561.

Sincerly,

Al Meyerhoff
Natural Resources Defense Council, Inc.
Stephen P. Berzon
Altshuler & Berzon

By /s/ Al Meyerhoff
AL MEYERHOFF

AM:klw

bcc: Ralph Lightstone, CRLA
David Roe, EDF
Elizabeth Martin, CAAP
Nick Arguimbau/Steve Dreistad, CBE
Jackie Warren, NRDC, NY
Chuck Benbrook/Skip Stiles, Office of Cong. George Brown
Ken Finney, Governor Brown's Office
Erik Janson, FOE
Jay Feldman, NCAMP
Judy Kunofysky, Sierra Club, SF
Peter Weiner, Dept. of Industrial Relations, S.F.
Peggy Semenario, AFL-CIO
Lawrie Mott, NRDC, SF

bcc: Laurence Gold, Special Counsel, AFL-CIO (Express Mailed)
Harry Snyder, Consumers Union

APPENDIX C

Copies to: B. G. Julin (6)
J. C. Summers (1)
A. M. Kaplan (1)

LONG-TERM FEEDING STUDY WITH 2-BENZIMIDAZOLECARBAMIC ACID, METHYL ESTER * (MBC, INE-965) IN MICE

Medical Research Project No. 3207-001

Haskell Laboratory Report No. 70-82

Part I of II Parts

Final Report on a Study
Conducted 10/13/78-10/16/80

Report by: /s/ Craig K. Wood
CRAIG K. WOOD
Section Supervisor
Chronic Oral Investigations

Approved by /s/ Phillip W. Schneider, Jr.
PHILLIP W. SCHNEIDER, JR.
Study Director
Section Supervisor,
Chronic Inhalation Investigations

/s/ Henry J. Trochimowicz
HENRY J. TROCHIMOWICZ
Manager, Toxicology

---

* 9th CAS: Carbamic Acid, 1H-Benzimadazol-2-yl-, methyl ester

Reviewed by: /s/ Christiann M. Barba
CHRISTIANN M. BARBA
Auditor, Quality Assurance
Committee

CKW:jrg:WP:2.2

Date Issued: January 26, 1982

N.B. References: E-18685; E-18685-AA, -AB, -AC, -BA, -DA, -DB, -EA, -EB

This report contains 886 pages

DUPONT [LOGO]

HASKELL LABORATORY

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HASKELL LABORATORY

CONFIDENTIAL

LONG-TERM FEEDING STUDY WITH 2-BENZIMIDAZOLECARBAMIC ACID, METHYL ESTER (MBC, INE-965) IN MICE

Medical Research Project No. 3207-001

Haskell Laboratory Report No. 70-82

Summary

Male and female CD^{R}-1 mice were fed for two years with diets that contained 0, 500, 1,500 or 7,500 ppm MBC. Due to a high mortality rate among male mice in the 7,500 ppm MBC treatment group, the dietary concentration of MBC for this male group was reduced to 3,750 ppm during test week 66 and, finally, the group was terminated during test week 73.

No effect on body weight, weight gain, clinical observations, or hematological parameters that could be attributed to the dietary administration of MBC was observed.

Male mice in the 7,500-3,750 ppm MBC group tended to consume more diet and had a lower food efficiency than male mice in the control group. Survival of male mice in the 1,500 and 7,500-3,750 ppm groups was significantly lower than that of the male control mice. Survival among male mice in the test groups was found to be related to the dietary concentration of MBC.

Male mice in the 1,500 and 7,500-3750 ppm MBC groups and female mice in the 7,500 ppm MBC group exhibited compound-related histomorphological changes in the kidney. Degenerative or toxic changes were observed in the livers of male mice in the test groups.

MBC administration in the diets of male and female mice, under the conditions of this study, *resulted in a hepatic carcinogenic effect. No "no observable effect level" of MBC was observed for this effect. No carcinogenic effect was observed in any other organ system examined.*

DUPONT [LOGO]

HASKELL LABORATORY

LONG-TERM FEEDING STUDY WITH 2-BENZIMIDAZOLECARBAMIC ACID, METHYL ESTER (MBC, INE-965) IN MICE

Medical Research Project No. 3207-001

Haskell Laboratory Report No. 70-82

Introduction

2-Benzimidazolecarbamic acid, methyl ester (MBC; INE-965) is considered to be a metabolite of 1-butylcarbamoyl-2-benzimidazolecarbamic acid, methyl ester (Benlate®, Benomyl, INT-1991). It is considered to have very low acute toxicity by the oral route of administration with an approximate lethal dose in young adult male CD® rats of greater than 17,000 mg MBC/kg body weight. However, single doses of 1,000 mg MBC/kg body weight or greater were associated with histologic and/or gross abnormalities in the testes. These abnormalities, which consisted of small, soft and/or discolored testes associated with degenerative germinal epithelium and a reduction in or the absence of sperm, were also observed in young male CD® rats that received ten, 3,400 mg/kg body weight doses of MBC over a two-week period. Other MBC-related effects noted after repetitive oral administration of 3,400 mg MBC/kg body weight included edema and focal necrosis of the duodenum, reduction in the blood-forming elements of the bone marrow, and a decrease in the large globular-shaped vacuoles located centrilobularly in the liver of the rats that survived the treatment. Two of the six treated rats died before the tenth treatment.

TABLE I

2-YEAR FEEDING STUDY IN CD®1 MICE WITH MBC

MALE

MEAN BODY WEIGHT (g)

Group:	I Control	III 500 PPM	V 1500 PPM	VII 7500-3750 PPM
Time on Test Weeks				
0	27.6	27.6	27.6	27.6
1	29.5	29.4	29.7	29.0
2	31.4	31.0	31.2	31.1
3	32.7	31.9*	31.8*	31.4*
4	33.2	32.9	32.7	32.6
5	34.3	34.1	34.1	33.6
6+	35.1	34.9	34.7	34.4
7	35.6	35.0	35.5	34.9
8	36.1	35.8	35.9	35.7
9	36.0	36.3	36.8	36.0
10	37.4	36.1	37.0	36.3
11	36.4	35.7	35.8	34.2*
12	36.9	36.4	36.8	36.0
13	37.1	36.6	37.2	36.1
14	38.0	37.7	38.0	37.0
15	35.4	36.2	37.0*	34.6
16	37.8	38.0	38.8	37.7
17	38.2	38.4	38.4	37.8
18	39.1	39.2	38.7	38.4
19	39.5	39.2	39.5	38.9
20	40.3	39.7	39.4	39.8
21	39.6	39.1	39.4	38.6
22	40.5	40.3	39.9	39.1
23	41.2	40.4	40.5	40.1
24	41.1	40.8	40.8	40.3
25	41.2	40.5	40.5	40.0
25+	41.9	41.2	41.2	41.3

* Different from control at $P < .05$ level of significance.

TABLE I—Continued

Group:	I Control	III 500 PPM	V 1500 PPM	VII 7500-3750 PPM
Time on Test Weeks				
28	42.4	41.9	42.1	41.4
30	43.6	42.8	42.7	42.1
32	44.2	42.5	42.4	42.4
34	40.8	40.2	40.2	40.8
36	43.4	41.7	42.0	42.1
38	43.0	41.6	41.7	41.2
40	42.6	42.1	42.4	41.9
42	42.3	41.6	40.9	40.8
44	43.5	42.5	42.0	42.1
45+	43.4	42.5	41.1*	40.7*
48	43.8	42.7	42.2	41.6
50	43.7	42.5	42.0	41.7
52	43.7	41.8*	42.1*	41.0*
56	43.9	42.9	42.4	41.4*
60	43.9	42.7	42.6	41.8
64	43.1	41.6	41.2	42.0
68	43.7	43.0	42.8	42.3
72	43.2	42.6	41.9	42.2
76	43.5	41.5	39.9	
80	43.3	41.9	41.1	
84	43.5	43.0	40.8	
88	43.4	43.4	40.0	
92	41.8	41.5	38.6	
96	41.7	41.8	38.8	
100+	41.6	41.2	38.2	
104	42.6	39.4*	37.6*	

* Different from control at $P < .05$ level of significance.

TABLE II

2-YEAR FEEDING STUDY
IN CD®1 MICE WITH MBC

MALE

MEAN BODY WEIGHT GAIN (g)

Group:	I Control	III 500 PPM	V 1500 PPM	VII 7500-3750 PPM
Time on Test Weeks				
0+- 1	1.9	1.8	2.1	1.5*
1- 2	1.9	1.6	1.5*	2.1
2- 3	1.4	0.9*	0.6*	0.3*
3- 4	0.5	1.1*	0.9*	1.1*
4- 5	1.0	1.2	1.4	1.1
5- 6+	0.9	0.8	0.6	0.9
6+- 7	0.5	0.2*	0.7	0.4
7- 8	0.5	0.8	0.4	0.9
8- 9	−0.2	0.5*	0.9*	0.3
9-10	1.5	−0.3*	0.2*	0.3*
10-11	−1.0	−0.3	−1.3	−2.1
11-12	0.5	0.7	1.0	1.8*
12-13	0.3	0.2	0.5	0.1
13-14	0.8	1.0	0.8	0.9
14-15	−2.6	−1.5*	−1.0*	−2.5
15-16	2.4	1.8	1.7	3.1
16-17	0.2	0.4	−0.4	0.1
17-18	0.9	0.8	0.4	0.6
18-19	0.4	0.0*	0.8	0.5
19-20	0.8	0.5	−0.2*	0.9
20-21	−0.7	−0.5	0.1	−1.2
21-22	0.9	1.1	0.4	0.5
22-23	0.7	0.1*	0.6	1.1
23-24	−0.1	0.4	0.3	−0.0
24-25	0.1	−0.3	−0.3	−0.3
25-25+	0.7	0.8	0.7	1.3*
25+-28	0.5	0.5	0.9	0.1

* Different from control at $P < .05$ level of significance.

TABLE II—Continued

Group:	I Control	III 500 PPM	V 1500 PPM	VII 7500-3750 PPM
Time on Test Weeks				
28-30	1.2	0.9	0.6*	0.7*
30-32	0.6	−0.3*	−0.3*	0.4
32-34	−3.3	−2.3*	−2.7	−1.6*
34-36	2.6	1.5*	1.8*	1.3*
36-38	−0.5	−0.2	−0.3	−0.9
38-40	−0.4	0.4*	0.7*	0.7*
40-42	−0.3	−0.4	−1.5*	−1.1*
42-44	1.2	0.9	1.1	1.3
44-45+	−0.3	−0.0	−1.0*	−1.3*
45+-48	0.4	0.1	1.1*	1.0
48-50	−0.0	−0.2	−0.1	−0.2
50-52	−0.0	−0.9*	−0.4	−0.8*
52-56	0.2	1.0	0.3	0.1
56-60	−0.2	−0.3	−0.2	−0.0
60-64	−1.3	−1.2	−1.7	−0.4
64-68	0.1	0.6	1.0	−0.3
68-72	−0.8	−1.0	−1.3	−0.7
72-76	−0.5	−1.4	−2.2	
76-80	−0.9	0.2	1.2*	
80-84	−0.1	0.6	0.1	
84-88	−0.5	0.4	−0.8	
88-92	−2.5	−1.5	−2.2	
92-96	−0.8	−0.4	−0.4	
96-100+	−1.1	−1.0	−0.9	
100+-104	0.3	−1.1	−0.1	
0-25	14.3	13.7	13.6	13.7
0-52	16.0	14.2*	14.6	13.4*
0-72	15.5	15.0	14.7	14.9
0-104	14.8	12.3	10.5*	

* Different from control at $P < .05$ level of significance.

APPENDIX D

NATURAL RESOURCES DEFENSE COUNCIL, INC.
25 Kearny Street
San Francisco, California 94108
415 421-6561

November 5, 1982

Washington Office
1725 I Street, N.W.
Suite 600
Washington, D.C. 20006
202 223-8210

New York Office
122 East 42nd Street
New York, N.Y. 10168
212 949-0049

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Anne Gorsuch, Administrator
Environmental Protection Agency
401 "M" Street, S.W.
Washington, D.C. 20460

Therese Murtagh, Chief
Information Services Section
Environmental Protection Agency
401 "M" Street, S.W.
Washington, D.C. 20460

Dear Ms. Gorsuch and Ms. Murtagh:

This is a request under the Freedom of Information Act (FOIA), as amended, (5 U.S.C. § 552) in conjunction with § 10 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 U.S.C. § 136(h)). It is made on behalf of the following organizations: American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); Natural Resources Defense Council, Inc.; Environmental Defense Fund; Friends of the Earth; National Coalition against Misuse of Pesticides; California Agrarian Action Project; and California Rural Legal Assistance.

On behalf of their members, these organizations request health and safety data retrievable from the files of the Environmental Protection Agency for the following pesticides: aldoxycarb, glyphosate ("Roundup"), permethrin, DD and telone. In particular, we request all studies, status reports and EPA documents relating to carcinogenicity, mutagenicity, neurotoxicity and teratogenicity and other reproductive effects of the abovenamed pesticides as referenced in § 10(d)(1) of FIFRA, including materials that have received accession numbers, EPA and evaluations of these materials and any pertinent submissions from pesticide registrants to EPA.

This request includes, but is not limited to, the following glyphosate studies:

Studies performed by Industrial Biotest (Reference source: Monsanto-Glyphosate (471 AC) IBT Validation Statuts Sheet, pages 151-153):

EXHIBIT "A"

Study Type	IBT Number	Study Date	Acct. Number
Subchronic Dermal	A-1549	07-18-72	094176
Subchronic Dermal Rabbit	A-2144	01-11-73	094176
Acute Oral Rabbit	A-2277	12-06-72	094176
Subchronic Dermal Rabbit	A-2468A	01-11-73	094176
Chronic Feeding Rats	B-564	01-14-74	094161
Reproduction Rats	B-566	07-26-73	094161
Carcinogenicity Mice	B-469	09-19-73	094161
Subchronic Oral Rats	B-1020	11-29-73	094161
Subchronic Oral Dogs	C-1021	06-19-72	094176
Mutagenicity Mice	E-567	01-24-72	094161
Residue Quail	E-1753	09-19-72	094171
Chronic Feeding	J-565	11-30-73	094161
Teratogenicity Rabbits	J-568	06-30-72	094161
Fish/Wildlife Study	R-2278	11-02-72	094161
Acute Inhalation Rats	T-2279	11-07-72	094161
Acute Subcutaneous Mice	601-5848	12-16-71	—
Cholinesterase Rats	601-6527	03-07-75	094688
Fish/Wildlife Study	621-4177	11-13-73	—
Fish/Wildlife Study	621-5412	08-01-74	094688
Mutagenicity Rats/Mice	623-7508	11-18-75	—
Residue	632-3894	10-16-73	094180
Mutagenicity	633-7507	02-20-76	—
Recombin. Assay	633-7801	03-05-76	—

EXHIBIT "A"—Continued

Study Type	IBT Number	Study Date	Acct. Number
Toxicity & Reproduction Chickens	651-3917	06-18-74	094688
Teratogenicity Rabbits	651-5275	08-28-74	—
Acute Inhalation	663-6290	07-09-75	094683
Subchronic Inhalation	633-6290 (74-116B)	07-24-75	—
Fish/Wildlife Study	665-3629	07-26-73	094171
Neurotoxicity Chickens	8580-9117	12-17-76	5G1862
Dominant Lethal Mice	8533-8920	—	—
Teratogenicity Rabbit	8580-8921	—	—
2-Year Chronic Oral Dog	8580-8922	—	—
3 Gen. Repro. Rats	8533-8923	—	—

Studies referred to or submitted in support of a tolerance amendment for glyphosate (reference source: *Federal Register* 43164, Vol. 46, No. 166, Thursday, August 27, 1981):

oral LD_{50} (rabbit); 90-day feeding (rat); 90-day feeding (dog); teratology (2 rabbit); teratology study (rat); 2-year feeding study (dog); 18-month feeding study (mouse); 2-year feeding study (rat); Ames assay; rec-assay; rec-assay (*B. subtilis*); Ames Test (*Salmonella*); dominant lethal assay (mouse)

Studies from a California Department of Food and Agriculture bibliography of Roundup data titles:

Human Patch Test with CP 70139 Formulation (MON 2139);

Acute Contact and Oral Toxicities of CP 67573 and (MON 2139) to Worker Honey Bees (9/16/72);

Summary of CP 67573 Metabolism Studies in Plants and Animals;

OP 67573—the Distribution and Excretion of CP 50435-^{14}C (CP 6/5/73 Metabolite) by the Rat;

The Duration of MON-0573 Biological Activity in Soil;

The Photolysis Run-Off and Leaching of MON-0573 on or in the Soil;

Soil Binding and Phytotoxicity of MON-0573 and Its Metabolites on Soil;

The Rate of Dissipation of MNO-0573 and its Metabolites on Soil;

Degradation and Metabolism of MON-0573 in River and Lake Bottom Sediments and Surface Water;

Run-off of MON 0573 from Inclined Soil Beds;

Roundup Herbicide Forest Ecosystem Study, Monsanto Report MSI-1578;

Chronic Toxicity of Glyphosate to the Fathead Minnow, E.G.&G. Bionomics Aquatic Tox. Lab. Oct. 1975 Monsanto Company;

Data in Support of Tolerance Requests for Glyphosate in Potable Water, Fish and Shellfish;

The Effect of Glyphosate on Nitrogen Fixation and Nitrification in Soil with Time;

Kinetics of "Aged" ^{14}C-Glyphosate in a Model Aquatic Ecosystem;

G-3780A Surfactant: Biodegradation in Natural Waters;

The Measurement of Pesticide Drift Resulting from Aerial Applications and the Product Activity Level on Sensitive Non-Target Plants;

Effects on Glyphosate on Food Preference—Blacktailed Deer; and

Residue Study with ^{14}C-CP 67573 in Bobwhite Quail.

We request that work begin on this immediately. In particular we request that the affected industry be notified immediately of the specific studies listed above. In addition, we request that all time periods and deadlines in the statute and regulations be strictly adhered to. During the past, in a prior FOIA request, a several-

month delay occurred between our initial request and notification of the industry. This delay made it necessary for the requestors to file a lawsuit. We hope this type of judicial action will not be necessary now.

Under the Freedom of Information Act and FIFRA, we are entitled to all of the requested materials. While FOIA contains an exemption for certain matters that are trade secrets, Congress specifically provided in the 1978 amendments to § 10 of FIFRA that the materials being requested here are not trade secrets, and that members of the public have the right to obtain pesticide health and safety data on the acute and chronic effects from pesticide exposure.

However, if all or any part of this request is denied, we request, as the Act requires, a list of the specific statutory exemptions upon which the EPA is relying to withhold information. If the EPA determines that some portions of the requested material are exempt, we request, in accordance with the Act, that we be provided with the remaining non-exempt portions. We, of course, reserve the right to appeal any decision to withhold information and expect that you will list the address and office where such an appeal can be sent.

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In addition, the health and safety properties of these pesticides is a matter of ongoing public debate. Release of this information will contribute to this debate by increasing public awareness of the possible adverse effects resulting from continued exposure to these toxic substances. Further, it is our intention, once this data is received, to have it reviewed by a body of independent scientists to determine whether the tests involved were adequately performed. Thus, disclosure of the data is required to better protect the public and our members by ensuring that the health and safety tests here conducted by the chemical industry were adequate for that purpose. Finally, all of the organizations making this request are non-profit, will not benefit financially from this information, and seek to obtain it solely to promote the public interest and well-being.

The Agency waived fees for our previous request. Because of the similarity of these requests, we assume the Agency will again grant a waiver. However, if the Agency refuses to waive fees and if the costs exceed $1,000, we request permission to review the records that are responsive to this request and then select those documents that we want copied.

Enclosed is our executed affirmation of non-multinational status. As provided in the Freedom of Information Act, we expect the Agency's initial response within ten working days. If you need any further information regarding this request, please contact Al Meyerhoff by telephone at 415/421-6561.

Sincerely,

Albert H. Meyerhoff
Natural Resources Defense
Council, Inc.
Stephen P. Berzon
Altshuler and Berzon

By /s/ _____
ALBERT H. MEYERHOFF